

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

Supreme Court, U. S.

**FILED**

**MAY 15 1978**

MICHAEL RODAK, JR., CLERK

\_\_\_\_\_  
No. 77-1444  
\_\_\_\_\_

CAROL C. JOHNSON,

*Petitioner,*

*against*

LOUIS J. LEFKOWITZ, et al.,

*Respondents.*

\_\_\_\_\_  
ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

\_\_\_\_\_  
**BRIEF FOR RESPONDENTS IN OPPOSITION**  
\_\_\_\_\_

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
*Attorney for Respondents*  
Two World Trade Center  
New York, New York 10047  
Tel. No. (212) 488-6044

SAMUEL A. HIRSHOWITZ  
First Assistant Attorney General

LILLIAN Z. COHEN  
Assistant Attorney General  
*of Counsel*

\_\_\_\_\_

## TABLE OF CONTENTS

---

|   | PAGE |
|---|------|
| Opinions Below .....                      | 1    |
| Jurisdiction .....                        | 1    |
| Question Presented .....                  | 2    |
| Facts .....                               | 2    |
| The District Court Opinion .....          | 2    |
| The Opinion of the Court of Appeals ..... | 3    |
| Statute Involved .....                    | 4    |
| Reason for Denying Certiorari .....       | 6    |
| Conclusion .....                          | 12   |

## TABLE OF CASES

|  |        |
|--|--------|
| <i>Arnett v. Kennedy</i> , 416 U.S. 134 (1974) .....               | 10, 11 |
| <i>Bishop v. Wood</i> , — U.S. —, 48 L. Ed. 2d 684<br>(1976) ..... | 10     |
| <i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972) .....        | 10, 11 |
| <i>Cafeteria Workers v. McElroy</i> , 367 U.S. 886 (1961) ..       | 7      |
| <i>Dandridge v. Williams</i> , 397 U.S. 471 (1970) .....           | 8      |
| <i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973) .....         | 7, 9   |
| <i>Gault v. Garrison</i> , 569 F. 2d 993 (7th Cir. 1977) .....     | 8      |
| <i>Ingraham v. Wright</i> , 430 U.S. 651 (1977) .....              | 7      |
| <i>Johnson v. Lefkowitz</i> , 566 F. 2d 866 (2d Cir. 1977) ...     | 3, 4   |

|  | PAGE |
|--|------|
| <i>Jones v. Hopper</i> , 410 F. 2d 1323 (10th Cir. 1969) ( <i>en banc</i> ) .....                                    | 10   |
| <i>Massachusetts Board of Retirement v. Murgia</i> , 427 U.S. 307 (1976) .....                                       | 7, 8 |
| <i>McIlvaine v. Pennsylvania</i> , 415 U.S. 986 (1974) .....   | 7    |
| <i>Mount Healthy City Board of Education v. Doyle</i> , 429 U.S. 274 (1977) .....                                    | 9    |
| <i>Nurenberg v. Ward</i> , 51 A D 2d 1022, 381 NYS 2d 412 (2d Dept. 1974) .....                                      | 10   |
| <i>Rubino v. Ghezzi</i> , 512 F. 2d 431 (2d Cir.) <i>cert. denied</i> 423 U.S. 891 (1975) .....                      | 7, 9 |
| <i>Russell v. Hodges</i> , 470 F. 2d 212 (2d Cir. 1972) .....  | 11   |
| <i>Talbot v. Pyke</i> , 533 F. 2d 311 (6th Cir. 1976) .....  | 7    |
| <i>Toban v. New York State Employees' Retirement System</i> , 33 A D 2d 965, 307 NYS 2d 78 (3d Dept. 1970) .....     | 10   |
| <i>Turner v. Fouche</i> , 396 U.S. 346 (1970) .....  | 8    |
| <i>Wahba v. New York University</i> , 492 F. 2d 96 (2d Cir. 1974), <i>cert. denied</i> 419 U.S. 874 .....            | 11   |
| <i>Weisbrod v. Lynn</i> , 383 F. Supp. 933 (D. D.C. 1974) (three-judge court), <i>aff'd.</i> 420 U.S. 940 (1975) ... | 7    |

## STATUTES

|   |                                   |
|---|-----------------------------------|
| 28 U.S.C. § 1254(1) .....                         | 1                                 |
| N.Y. Retirement and Social Security Law § 70 .... | 2, 3, 4, 5,<br>6, 7, 8, 9, 10, 11 |

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

---

No. 77-1444

---



---

CAROL C. JOHNSON,

*Petitioner,*

*against*

LOUIS J. LEFKOWITZ, et al.,

*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

**BRIEF FOR RESPONDENTS IN OPPOSITION**

---

**Opinions Below**

The opinion of the Court of Appeals for the Second Circuit is reported at 566 F. 2d 866. The opinion of the District Court has not been reported to date. Copies of the opinions are annexed to the petition.

**Jurisdiction**

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

### Question Presented

Did the Court of Appeals for the Second Circuit correctly hold that Section 70 of the New York Retirement and Social Security Law, which provides for mandatory retirement of members of the state employees' retirement system at the age of 70, is constitutional?

### Facts

Petitioner, a tenured employee in the state civil service system, was mandatorily retired from his position as an attorney in the New York State Department of Law when he reached the age of 70. His retirement was pursuant to New York Retirement and Social Security Law, Section 70. Thereafter he was granted two extensions of his employment pursuant to Section 70(c). His efforts to obtain a third extension were unsuccessful and, accordingly, his employment was terminated on March 31, 1974.

Exactly three years later, on March 31, 1977, petitioner commenced an action in the District Court seeking, among other relief, a declaration that Section 70 is unconstitutional on its face and as applied. In addition, he sought an order reinstating him to his position, awarding him back pay and otherwise restoring his rights to benefits which would have accrued since the termination of his employment.

### The District Court Opinion

On May 16, 1977, the District Court granted respondents' motion to dismiss the complaint which had been made on the grounds that (a) the Court lacked jurisdiction over the subject matter and (b) the complaint failed to state a claim upon which relief could be granted. In rejecting petitioner's attack on the constitutionality of the statute, the Court

cited a series of decisions, including several in this Court, which had upheld the constitutionality of a variety of mandatory retirement statutes in the face of arguments similar to those made by petitioner. The Court then held that petitioner's claim that he was arbitrarily refused an extension did "not constitute a constitutional question or one conferring federal jurisdiction". The Court noted however that, contrary to petitioner's assumption, he was not automatically entitled to an extension simply because he met certain of the statute's requirements.

### The Opinion of the Court of Appeals

On December 14, 1977, the Court of Appeals for the Second Circuit affirmed the decision of the District Court dismissing petitioner's complaint. The Court was "convinced . . . that the retirement provisions [contained in § 70] are a reasonable expression of state policy and clearly meet constitutional standards." *Johnson v. Lefkowitz*, 566 F.2d 866, 867 (2d Cir. 1977).

In rejecting petitioner's claims that § 70 violates the equal protection clause and creates an irrebuttable presumption, the Court pointed out that strict scrutiny of the statute was not required since age is not a suspect classification. Moreover, petitioner does not have a constitutionally protected right to public employment. The Court then found that

"Without question . . . § 70 is reasonably related to legitimate state interests in efficiency and economy. A mandatory retirement policy allows department heads to plan the training and advancement of their employees, and motivates young workers to acquit themselves well and to progress through the ranks. And the statute before us, which permits some employees to continue in their jobs until the age of 78, serves these legitimate state purposes without needless prejudice to

the greater number of qualified employees." 566 F.2d at 869.

The Court rejected petitioner's contention that termination under the statute violated his right to procedural due process without deciding whether such a dismissal affected petitioner's right to liberty or property. In the Court's view, the interest of each retiree in having a due process hearing was far outweighed by the enormous administrative cost to the state in conducting them.

The Court dismissed as frivolous arguments by petitioner that § 70 constitutes cruel and unusual punishment and results in an unconstitutional delegation of discretion.

Finally, the Court concluded that insofar as petitioner challenged the way in which the statute had been applied in his case, the question was simply one of state law and did not confer federal jurisdiction.

### Statute Involved

#### Section 70. Retirement and Social Security:

• • •

"b. Any member who attains age seventy shall be retired on the first day of the calendar month next succeeding such event. Such retirement shall be on the basis of 'Option One-half', unless the member files an effective election pursuant to section ninety of this article to retire on a different basis. If he shall have filed such an election, his retirement allowance shall be computed in accordance with the basis so selected by him. The provisions of this subdivision with respect to mandatory retirement shall be inapplicable to:

1. An elective officer.
2. A judge.
3. A justice.

4. An official referee.
5. A person holding office by virtue of an appointment to fill a vacancy in an elective office.
6. An employee of the port of New York authority.
7. A person who last became a member before April eleventh, nineteen hundred forty-five, and who serves continuously after such date in one or more of the following capacities:
  - (a) A clerk of a court, as provided in the constitution, article six, section twenty-one.
  - (b) An appointee of the governor.
  - (c) An employee of the legislature drawing an annual salary, or
  - (d) A chaplain of a county penal institution having served as such chaplain for not less than thirty years, or
8. A commissioner of elections.

(c) Notwithstanding the provision of subdivision b of this section, the state civil service commission may approve the continuance in service of members who have attained age seventy. Such approvals shall be for periods not to exceed two years each. No such approval shall be given unless:

1. The head of the department in which the member is employed shall file a written statement with the comptroller approving such continuance, and
2. The medical board shall certify that such member is physically fit to perform the duties of his position, and

3. The state civil service commission shall find that:

- (a) Such member is less than seventy-eight years of age, and
- (b) His continuance in service would be advantageous because of his expert knowledge and special qualifications.

The service of any such member may, however, be terminated at any time by the head of the department in which he is employed upon sixty days written notice to such member."

#### REASON FOR DENYING CERTIORARI

**The Court below correctly held that Section 70 of the New York Retirement and Social Security Law, which provides for mandatory retirement of members of the state employees' retirement system at the age of 70, is constitutional in all respects.**

Petitioner challenges the constitutionality of Section 70 of the New York Retirement and Social Security Law, pursuant to which he was mandatorily retired, on the grounds that (a) it abridges the fundamental right to work (Complaint, ¶ 31); (b) it permits the termination of a tenured employee without procedural due process (Complaint, ¶ 33); (c) it creates an irrebuttable presumption based upon age (Complaint, ¶ 35); (d) it results in a denial of equal protection (Complaint, ¶¶ 36, 37); (e) it impairs the contractual relationship of tenured civil service employees (Complaint, ¶ 41); and (f) it permits an unconstitutional delegation of authority to those who must administer it (Complaint, ¶¶ 31, 37).<sup>\*</sup> There is no merit to any of these

<sup>\*</sup> Petitioner also claims that his termination violated the Eighth Amendment prohibition against cruel and unusual punishment.

(footnote continued on following page)

claims. Indeed, they have been rejected in a variety of contexts by virtually every court which has considered them, including this Court. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) (mandatory retirement of state police officers at age 50); *McIlvaine v. Pennsylvania*, 415 U.S. 986 (1974) (mandatory retirement of state police officers at age 60); *Rubino v. Ghezzi*, 512 F. 2d 431 (2d Cir. 1975), *cert. denied* 423 U.S. 891 (1975) (mandatory retirement of state court judges at age 70); *Weisbrod v. Lynn*, 383 F. Supp. 933 (D. D.C. 1974) (three-judge court), *affd.* 420 U.S. 940 (1975) (mandatory retirement of federal civil service employees at age 70); *Talbot v. Pyke*, 533 F. 2d 311 (6th Cir. 1976) (mandatory retirement of municipal employees at age 70). Accordingly, the Court of Appeals correctly held that the complaint should be dismissed insofar as it challenges Section 70.

Contrary to petitioner's assumption, there is no constitutionally protected right to public employment. See *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961). Nor is a classification based upon old age a "suspect class" comparable to classification based upon sex, race or national origin. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). If there were any doubts in this regard they were resolved by this Court in its opinion in the *Murgia* case. The Court stated:

"This Court's decisions give no support to the proposition that a right of governmental employment *per se* is fundamental. See *San Antonio School District v. Rodriguez*, [411 U.S. 1 (1973)]; *Lindsey v. Normet*, 405 U.S. 56, 73 (1972); *Dandridge v. Williams*, [397 U.S. 471] at 485. . . .

"Nor does the class of uniformed state police officers over 50 constitute a suspect class for purposes of equal

(footnote continued from preceding page)

However, as this Court very recently reaffirmed, such a claim has no place in the context of a civil proceeding. See *Ingraham v. Wright*, 430 U.S. 651 (1977).

protection analysis. *Rodriguez, supra*, at 28, observed that a suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process'. While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." 427 U.S. at 313.

Since petitioner has not shown either the existence of a fundamental right or a suspect classification his equal protection claim is not subject to "strict judicial scrutiny" but must simply satisfy the "rational basis standard". *Massachusetts Board of Retirement v. Murgia*, 427 U.S. at 314. Section 70 easily meets this test.

The main purposes to be accomplished by Section 70 are greater efficiency and economy in the state service, on the one hand, and the advancement and promotion of younger members of the civil service, on the other. Plainly, the mandatory retirement of employees reaching the age of 70 is a reasonable means for furthering these valid State interests. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Turner v. Fouche*, 396 U.S. 346, 362 (1970). Contrast *Gault v. Garrison*, 569 F. 2d 993 (7th Cir. 1977). Moreover, contrary to petitioner's assumption, these state interests are not undercut by studies which show that many elderly workers are productive, particularly in light of the fact that Section 70 permits appropriate extensions where the employee is fit and it is advantageous to his employer. Therefore, Section 70 does not violate peti-

tioner's right to equal protection vis-a-vis those employees under the age of 70.

Nor has petitioner been denied equal protection vis-a-vis persons over 70 whose service has been continued pursuant to the statute. As the Court below properly noted, the status of those employees is not based upon a classification established by the State, but merely upon individual determinations by agency heads made on a case-by-case basis. The statute specifically requires that each extension in service beyond age seventy be made only where such extension would be advantageous to the employing agency because of the employee's expert knowledge and qualifications. Section 70(c)(3). Therefore, absent an allegation that the determination not to continue him was based upon a constitutionally impermissible standard, e.g. race, petitioner has no more shown a violation of his constitutional rights than has any person who, in the ordinary course, is not hired for a particular job. See *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977).\*

The absence of a fundamental right or suspect classification also defeats petitioner's claim that Section 70 establishes an unconstitutional irrebuttable presumption. *Rubino v. Ghezzi*, 512 F. 2d 431, 433 (2d Cir. 1975). Indeed, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), in which this Court held unconstitutional a presumption based upon sex, the Court expressly distinguished between classifications based on such "non-suspect" criteria as "intelligence or physical disability" and such factors as "sex", "race" or "national origin". 411 U.S. at 686. In any

---

\*Petitioner contends in ¶ 31 of the Complaint that Section 70 results in an unconstitutional delegation of discretion to those who must administer it. The contention is frivolous on its face. The statute does not confer arbitrary discretion. On the contrary, it contains clearly ascertainable and sufficiently defined standards to guide administrators in an area where flexibility is desirable to implement the State's policy.

event, since Section 70 does permit continued employment past the age of 70 in appropriate cases, as a practical matter the presumption made by Section 70 is rebuttable at least to that extent.

Petitioner's claim that he was "deprived of his tenured civil service position without procedural due process" (Complaint, ¶ 33) puts the cart before the horse. The guarantees of due process are not called into play unless the government's action has affected a property or liberty interest. Mandatory retirement pursuant to Section 70 affects neither.

As a civil service employee, the terms and conditions of petitioner's employment and, hence, the extent of his property interest were defined by statute. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Jones v. Hopper*, 410 F. 2d 1323, 1328 (10th Cir. 1969) (*en banc*). Section 70 was one of those conditions and it was binding on petitioner. *Arnett v. Kennedy*, 416 U.S. 134 (1974). Pursuant to Section 70(b), petitioner's permanent status ended automatically when he reached age 70, and with it ended his entitlement to a hearing before termination under Section 75 of the Civil Service Law. See *Toban v. New York State Employees' Retirement System*, 33 A D 2d 965, 307 N.Y.S. 2d 78 (3d Dept. 1970).<sup>\*</sup> When his employment was continued past the age of 70 pursuant to Section 70(c), his job security derived solely from that section. Significantly, Section 70(c) specifically provides that such continued service may be terminated at any time upon 60 days written notice to the employee. See *Nurenberg v. Ward*, 51 A D 2d 1022, 381 N.Y.S. 2d 412 (2d Dept. 1974), which upheld

<sup>\*</sup> This being a condition of petitioner's employment, there is no basis for his present claim that mandatory retirement impaired his "implied contract with the State that he [would] be continued in employment so long as he remains fit and meritorious" (Complaint, ¶ 41). *Bishop v. Wood*, — U.S. —, 48 L.Ed. 2d 684 (1976).

the constitutionality of the 60 day notice provision against an attack made on equal protection and due process grounds. Petitioner, therefore, erroneously assumes that he was deprived of a property right.

Nor does mandatory retirement because of age affect a protected liberty interest. In *Arnett v. Kennedy*, Mr. Justice Rehnquist, writing for the plurality, stated that an employee's interest in liberty under the Fourteenth Amendment "is not offended by dismissal from employment itself" although the dismissal is based upon a finding of cause. 416 U.S. at 157. On the contrary, the employee's liberty interest is offended only when his dismissal is "based upon an unsupported charge which could wrongfully injure [his] reputation" (*Id.*)—a charge such as "dishonesty, or immorality". *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). It is evident that Section 70, which provides for automatic retirement, results in no such injury. Cf. *Russell v. Hodges*, 470 F. 2d 212 (2d Cir. 1972); *Wahba v. New York University*, 492 F. 2d 96 (2d Cir. 1974), *cert. denied* 419 U.S. 874.

In any event, as the Circuit Court determined, petitioner's due process argument should be rejected even if Section 70 affected a protected interest since

"the administrative cost to the state of providing each retiree with a hearing would be enormous, and by far outweighs the hardship to the individual." 566 F. 2d 869.

In short, petitioner has failed to show that there is anything about the operation of the provisions of Section 70 to distinguish it from all of the other mandatory retirement statutes which have been upheld. Therefore, his attack on the statute is without merit, as the Court below properly held, and there is no call for any review by this Court.

**CONCLUSION**

**For the foregoing reason the petition for a writ of certiorari should be denied.**

Dated: New York, New York  
May 11, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
*Attorney for Respondents*

SAMUEL A. HIRSHOWITZ  
First Assistant Attorney General

LILLIAN Z. COHEN  
Assistant Attorney General  
*of Counsel*